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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 535

C. W. TITUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court did not write an opinion. The opinion of the Circuit Court of Appeals (R. 81-86) is reported in 150 F. 2d 508.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 26, 1945 (R. 86-87) and rehearing was denied by that court on July 24, 1945 (R. 96). The petition for a writ of certiorari was filed on October 19, 1945. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the C. W. Titus Company was an association taxable as a corporation in the taxable years in question within the meaning of Section 3797 of the Internal Revenue Code.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * * *

(3) *Corporation*.—The term “corporation” includes associations, joint-stock companies, and insurance companies.

* * * * *

[26 U. S. C. 3797.]

STATEMENT

The facts found by the district court (R. 23-26) and restated by the Circuit Court of Appeals in its opinion (R. 81-82) may be summarized as follows:

C. W. Titus, Inc., was incorporated under the laws of Oklahoma in 1926. Of its 3,000 shares of capital stock, 2,998 shares were issued to the taxpayer and one share each to his wife and sister. In the same year, the corporation sold

its oil and gas producing properties and immediately invested \$1,576,098.16 of the proceeds thereof in stocks and bonds. It continued to carry on its business until December 31, 1927, at which time its three stockholders entered into an agreement designated "Articles of Agreement and Declaration of Trust," by which a trust was set up under the name of the C. W. Titus Company. The corporation transferred all of its assets to the Company in exchange for the 3,000 shares of stock it had issued and, in 1931, was dissolved. (R. 24.) Under the "Articles of Agreement and Declaration of Trust" (R. 7-18) the taxpayer and his wife and sister became the subscribers to the 300,000 shares of beneficial interest which the trust was authorized to issue and the taxpayer was designated as the first trustee. The trustee had very broad powers and was authorized to acquire all kinds of property and manage or sell it, and particularly to deal in stocks and securities and in oil properties. The trust was to run for a period of twenty-one years, unless previously dissolved. No provision was made empowering the shareholders to discharge the trustee or to exercise any control over his acts. All assets of the Company came from the corporation, except the financial gain from the use of property or funds which it had acquired from the corporation. (R. 24-25.)

No taxable gain was reported by the C. W. Titus Company or by the taxpayer at the time

the C. W. Titus Company acquired the corporation's assets. On the contrary, the Company and the corporation filed consolidated or joint corporate income tax returns from the time of the creation of the Company until the corporation was dissolved in 1931. After that and through the year 1940, the company filed a corporate income tax return, as is required of "associations," by which it was designated "Oil and Investment Trust, Acts as principal." The taxpayer filed separate individual returns during all this time. During the greater portion of its existence, the C. W. Titus Company did many things indicating a claim of corporate character. (R. 25-26.) Both the taxpayer and the Government throughout all the years regarded the C. W. Titus Company as an "association" within the meaning of the federal income tax laws and considered that the company was correct in not reporting a taxable gain at the time it received the assets of the corporation, because the transfer was a tax-free reorganization of C. W. Titus, Inc. (R. 26).

The taxpayer did not assert his present position (that the transfer of the corporate assets in 1928 to the C. W. Titus Company was in effect a transfer to him personally and that all of the transactions of the Company were his own personal transactions) until the time had passed when the Government could legally demand the additional tax for the taxable gain of the tax-

payer in acquiring the assets of the corporation (R. 26). The district court concluded that the taxpayer should be denied recovery and that judgment should be entered for the United States (R. 27). The Circuit Court of Appeals affirmed the district court's judgment (R. 86-87).

ARGUMENT

1. The alleged conflict between the decision of the court below and that of this Court in *Morrissey v. Commissioner*, 296 U. S. 344, on the question of whether the C. W. Titus Company was an association within the meaning of the applicable statute is non-existent. The court below applied the principles of the *Morrissey* case, *supra*, to the peculiar facts upon which this case rests and concluded, correctly we think, that the company was not a pure trust but a business association.

There was here an association of three persons who in 1927 organized the company as a business trust, with the avowed purpose of permitting others to join it as associates. There was a trust corpus and a business purpose, and the management of the Company's business activities was placed in the hands of a trustee. The life of the enterprise was fixed at twenty-one years, and it was expressly provided that the shareholders could not require that the trust be dissolved. The Company's shares were saleable

and transferable on the books of the association, and the liability of the trustee, as well as of the shareholders, was limited, except that, as is usual in similar situations, the trustee was held liable for breach of personal trust.

From its organization in 1927 to and including the taxable years here in question, 1939 and 1940, the Company was treated by all concerned as an association, particularly for tax purposes, but for other purposes as well (R. 26). Thus it was regarded as having been formed in the course of a non-taxable corporate reorganization, with the result that no tax was paid in respect of the distribution to it in 1928 of the assets of its predecessor corporation. Since the bar of the statute of limitations has fallen with respect to the year 1928 (R. 24, 26), moreover, no tax can be imposed with respect to the receipt of income at that time. And unless the Company is an association, as the court below held it to be, the eventual distribution to the petitioner of the property originally held by the corporation will give rise to no tax liability even if that distribution results in gain to the petitioner. It is the apparent purpose of this suit to obtain a judgment founded on the assumption that the property of the Company is already, in substance, that of the petitioner, and upon the basis of which the petitioner's eventual receipt of the assets will be deemed tax free.

The petitioner asserts that the decision below conflicts with that of the Sixth Circuit Court of

Appeals in *Commissioner v. Gibbs-Preyer Trusts Nos. 1 & 2*, 117 F. 2d 619, with respect to the statement made by the latter court to the effect that the test, in determining whether a trust is an association, must be found in what the trustees actually do rather than in the existence of unused powers. This statement, however, must be viewed in the light of the peculiar facts in that case and the actual basis of the court's decision which was that the terms of the written instrument, as to the trustee's powers there involved, were not intended to and did not become operative so long as the properties were managed by members of the family or beneficiaries in view of a contemporaneous oral agreement between the parties to that effect. There is therefore no conflict between the *Gibbs-Preyer* decision and the decision below. It is well settled that the parties to a trust instrument are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument. *Helvering v. Coleman-Gilbert*, 296 U. S. 369, 374. The fact that the Company's business may actually have been conducted for the sole benefit of the petitioner is, therefore, irrelevant.

2. Likewise without merit is the petitioner's contention that the income of the trust should be held taxable to him under Sections 166 or 167, or, in the alternative, under Section 22 (a) of the Internal Revenue Code in accordance with

the principle of *Helvering v. Clifford*, 309 U. S. 331. No more need be said with regard thereto than that the contention assumes that the C. W. Titus Company was not an association but a pure trust, contrary to the finding of both the district court and the court below.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1945.

